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# THE JOURNAL OF AIR LAW AND COMMERCE

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## THE LEGAL FRAMEWORK OF AIRPORT OPERATIONS

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### INTRODUCTION

IN a letter dated February 20, 1952 from President Truman to Mr. James H. Doolittle,\* the President expressed his concern about "airplane accidents, both commercial and military, that have occurred in the take-off and landing of aircraft, especially in heavily populated areas" and the "anxiety in some of our cities" which these accidents have occasioned. Accordingly, he appointed a Commission (known as the "President's Airport Commission") consisting of Mr. James H. Doolittle, as Chairman, Mr. Charles F. Horne, and Dr. Jerome C. Hunsaker to make a study on the "Nation's policy on airport location and use." With the assistance of a staff under the directorship of Mr. S. Paul Johnston, the requested report was prepared and delivered to the President on May 16, 1952.

As a part of the background for the preparation of the report, the Commission desired a survey made of the applicable law bearing upon airport location and use. This article is substantially the same as one of the Memoranda which was submitted to the Commission as a part of that survey.

This article, therefore, is designed to discuss some of the legal ramifications of the basic question raised in any study of airport location and use: how can the conflicting interests between airport operations and the rights of nearby property owners best be resolved? Legal aspects of possible solutions to this question will also be discussed.

The first section herein discusses the conflicting claims between property owners and airports: Under what circumstances may a prop-

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\*19 JRL. AIR L. & Com. 101 (Winter) and 221 (Spring, 1952).

erty owner by court action limit the operations of an airport, or, indeed, put it out of business altogether? Or, vice versa, under what circumstances may an airport seek legal remedies to prohibit constructions on adjacent areas which constitute a hazard to air operations?

The second section discusses the scope of a state's authority, either by itself or through enabling legislation to a municipality or other authorized public unit, to foster airport growth: Are there any limits on the exercise of its power of eminent domain to acquire land for airport construction? Does the fact that an airport was fathered through state or municipal funds, rather than private capital, or is licensed by a state commission or a local public body, lessen the rights which the landowner adjacent to an airport has in the enjoyment of his property? To what extent can a state adopt zoning laws to protect airport approaches and when do such zoning laws reach the point where they "take" the property of an adjacent landowner so as to violate a state or the federal constitution?

The third section discusses the scope of the power of the Federal Government in relation to the problem of airport location: To what extent may it utilize the power of eminent domain to acquire land for airport construction and to zone areas adjacent thereto?

Aviation law is a relatively recent arrival on the scene of American jurisprudence. Accordingly, it is not surprising to find that certain areas in the questions posed above have not been covered by judicial decision or legislative action, or indeed, have conflicting decisions awaiting resolution by the Supreme Court or appropriate legislation. Where the law is unclear, this article will endeavor to point out the forum for decisive action, whether it be judicial, legislative (Federal or State), or Constitutional amendment.

#### CONFLICTING CLAIMS BETWEEN AIRPORT OPERATIONS AND THE RIGHTS OF NEARBY PROPERTY OWNERS

A justifiable summary of the many cases in which this problem has been involved would be that upon each particular set of facts the court has endeavored to weigh conflicting equities in reaching a result. On the one hand there is the property owner who is entitled to the enjoyment of his property without hazards and undue inconvenience. On the other hand there is the airport owner who is entitled to a certain freedom in the operation of his enterprise, and the increasing interest of the general public in air transportation.

Unfortunately, the law on this matter is so geared to the facts of each specific case, that it is impossible to give a more precise guide to the resolution of conflicting interests between airports and landowners. An effort will be made, however, to show the average type of situation which a court is called upon to consider.

But first two preliminary matters should be briefly touched upon which, while of collateral interest to the basic question, have frequently

been important factors in the courts' efforts to resolve conflicting claims.

First of all, the legal basis upon which an aggrieved landowner seeks relief has called for some attention. Is the proper remedy an action based upon an alleged "trespass" into the air space above the property owner's land by aircraft from an adjacent airport<sup>1</sup> or the more frequent action alleging a "nuisance" through the result of the airport's operations which affects the landowner's enjoyment of his property?<sup>2</sup> Important legal consequences may flow from the particular remedy chosen, for in the case of a trespass nominal damages may be awarded to the landowner even though no actual damages are shown.<sup>3</sup> In the case of an alleged nuisance, actual damage must be proven by the landowner.

Secondly, the question of the extent to which a landowner owns the airspace above his property has become an important question in some cases. Thus, under the "trespass" theory the Court must find that the airspace invaded was actually owned by the landowner. As will also be pointed out later, the question of private ownership of the airspace also comes into play when there is a problem involving the "taking" of property without the due compensation or the exercise of the power of eminent domain.

Briefly, as Mr. Charles S. Rhyne has pointed out,<sup>4</sup> there have been five theories advanced regarding the ownership of airspace:

(1) The ancient common law maxim, obviously a flight of the imagination prior to the development of air transportation, held that the landowner owned all the airspace up to the "skies."<sup>5</sup> No case has ever adopted this theory and, indeed, the Supreme Court in *United States v. Causby*, 328 U.S. 256 (1946) held that this doctrine "has no place in the modern world."

(2) The landowner owns the air space above his property to an unlimited extent subject to an "easement" or "privilege" of flight in the public. This is the theory which was incorporated in the Uniform State Law for Aeronautics in 1923 presently in effect in a number of

<sup>1</sup> This theory has been adopted by some courts: *Brandes v. Mitterling* 67 Ariz. 349, 196 P (2nd) 464 (1948); *Burnham v. Beverly Airways, Inc.* 311 Mass. 628, 42 N.E. (2d) 575 (1942); *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Vanderslice v. Shaun*, 26 Del.Ch. 225, 27 A (2d) 87 (1942); *Commonwealth v. Nevin & Smith* 1928 USAvR 39 (Ct. 2. Sess. Jeff. Ct., Pa. 1922).

<sup>2</sup> Most state courts follow this theory. e.g. *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). The Supreme Court has specifically rejected the trespass theory stating that "common sense revolts" at the idea of "countless trespass suits" in airspace. *United States v. Causby* 328 U.S. 256, 261 (1946).

<sup>3</sup> In the *Burnham* case, note 1 supra, \$1. damages were awarded.

<sup>4</sup> Rhyne, *Airports and the Courts* (1944), pages 154 to 162. Rhyne, *Airport Legislation and Court Decisions*, 14 J. of Air Law and Com. 289 (1947). These two studies of Mr. Rhyne are an excellent coverage of the field of airport operations and are heavily relied upon herein for the period prior to 1948.

<sup>5</sup> "*Cujus est solum ejus est usque ad coelum.*" 1 Coke, *Institutes* 19th ed. 1832, Ch. 1, para. 1(4a). See also Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 Jrl. of Air Law 329, 531 (1932).

states.<sup>6</sup> The Restatement of the Law of Torts of the American Law Institute in 1934 also embodied this theory.<sup>7</sup> The courts of a few states still discuss conflicting claims between airport and landowner in terms of this theory.<sup>8</sup>

(3) The landowner owns the air space up to such heights as is fixed by statute, with flights under that height being "trespasses." This theory has found acceptance primarily in Massachusetts.<sup>9</sup> One Federal court would appear to adopt the reverse implication from such a theory by pointing out that flights above the minimum cruising heights set forth by the C.A.A. cannot possibly be considered actionable no matter what damage may have been caused.<sup>10</sup>

(4) The landowner owns the air space up as far as it is possible for him to take effective possession.

(5) The landowner owns the air space up as far as he actually occupies or of which it is *probable* that he will ever take effective possession.

The distinction between (4), which appears to have been followed by a number of state courts,<sup>11</sup> and (5), which was the one pronounced by the Supreme Court in the *Causby* case,<sup>12</sup> is the difference between

<sup>6</sup> 11 U.L.A. 157 (Supp. 1947) "Section 3. Ownership of Space. The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4." Section 4 authorizes flights unless so low as to interfere with existing use of property or as to be eminently dangerous to persons or property. This statute in 1947 was in force in 22 states. The concept of ownership of air space therein has since been repudiated by its original sponsors, the Aviation Committee of the Commissioners on Uniform State Laws and the American Bar Association's Committee on Aeronautical Law. Rhyne, note 4 above, pages 109 to 112.

<sup>7</sup> Section 194.

<sup>8</sup> *Reaver v. Martin Theatres of Florida*, 46 So. (2d) 896 (Fla. Sup. Ct. (1951)); *Vanderslice v. Shaun*, 26 Del.Ch. 225, 27 A (2d) 87 (1942); *Guith v. Consumers Power Co.* 36 F. (2d) 21 (D.C. Mich. 1940).

<sup>9</sup> *Smith v. New England Aircraft Co.*, 270 Mass. 511, 170 N.E. 385 (1930); *Burnham v. Beverly Airways, Inc.* 311 Mass. 628, 42 N.E. (2d) 575 (1942). Thus in the *Burnham Case*, as noted in note 3 above, flights below 500 feet were considered technical trespasses and \$1. in damages awarded.

<sup>10</sup> *Boskovich v. U.S.A.*, 3 Avi. 17, 252 D.C. Utah 1950). Court dismissed Plaintiff's complaint alleging damage through fright of his chickens because of the noise of an Army formation flight at 1000 feet. Partial grounds for the dismissed case was that the flight was "lawful."

<sup>11</sup> *Swetland v. Curtiss Airports Corp.*, 41 F 2d 929 (D.C. Ohio 1930), modified 55 F 2d 201 (C.C.A. 6th 1931). *Delta Air. Corp. v. Kersey*, 193 Ga. 862, 20 S.E. (2d) 245 (1942); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Dutton v. Mendocino County* 1949 USAvR 1 (Cal. Sup. Ct. Mendocino County 1948).

<sup>12</sup> *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1092, 90 L. Ed. 1206 (1946). The case was remanded to the Court of Claims for the assessment of damages. The Government's planes had utilized a glide angle of 83 feet over Plaintiff's property. The Court of Claims held there was a "taking" up to 365 feet which was 300 feet over the tallest object on Plaintiff's property. The court concluded:

"The result of this, we recognize, is to vest in the United States the right to fly its airplanes at any altitude above 365 feet with impunity. This, of course, would prevent the plaintiffs from erecting on their property a building of the height of the Empire State Building or any structure more than 365 feet in height. Were this property located at a place where there was any likelihood that such a structure would be erected on it, the defendant without paying for it would have no right to the airspace above the property to an altitude so

air space which *could conceivably be used* if, for example, the landowner wanted to demolish his house and build another (Empire State Building) or which he is actually using or probably ever will use.<sup>12a</sup> These two theories are predominant today but there has been no final agreement as to which is to be followed.

Returning to the main question which this section seeks to explore — the manner in which courts balance the conflicting interests of airports and the landowner, it was earlier noted that the courts attempted to balance the equities involved.<sup>13</sup> There is one legal principle which seems well settled however; an airport, flying school, or landing field is not a nuisance *per se*, but it may become such from the manner of its construction or operation, or because of its unsuitable

low as would prevent such a structure from being erected. But here there was but the most remote possibility that plaintiffs would ever put this property to such a use. The flight of airplanes above their property at a greater altitude than 365 feet in no way interfered with their possession and enjoyment of it or with any use they might conceivably make of it. In such case we do not think the defendant should have to pay for the right to fly its airplanes above this altitude. Stated otherwise, if defendant flew its airplanes at 366 feet or more above this property, we do not think it can be said that it has imposed a servitude upon it." (*Causby v. United States*, 1947 USAvR 513, 516 (U.S. Ct. Cls. 1948)).

<sup>12a</sup> Congress appears to have taken this view for in giving the Administrator power to condemn easements in the airspace in case of Federally owned and operated airports, it stated that "probable future use of the underlying land" may be considered, 49 USC 452.

<sup>13</sup> Perhaps the best way to explain the application of this principle would be to cite from a typical, well reasoned case. *Antonik v. Chamberlain*, 3 Avi. 14,500 (Ct. of Appeals, 9th Jud. District, Ohio, 1947).

"... the principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.

"In our business of judging in this case, while sitting as a court of equity, we must not only weigh the conflict of interests between the airport owner and the nearby landowners, but we must further recognize the public policy of the generation in which we live. We must recognize that the establishment of an airport of the kind contemplated is of great concern to the public, and if such an airport is abated, or its establishment prevented, the consequences will be not only a serious injury to the owner of the port property but may be a serious loss of a valuable asset to the entire community. "The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of his property. This rule has sometimes been erroneously interpreted as a prohibition of all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property. The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort." 39 Am. Jur., Nuisances, Sec. 30.

"All systems of jurisprudence recognize the requirement of compromise in the social state. Members of society must submit to annoyances consequent upon the reasonable use of property. 'Sic utere tuo ut alienum non laedas' is an old maxim which has a broad application. If such rule were held to

location.<sup>14</sup> Beyond this premise, however, the judicial balance of interests mentioned above comes into play.

The usual complaints by landowners can be grouped together as (a) noise, dust, glaring lights, (b) flights at low altitude, and (c) apprehension of danger. The usual defense by airport owners is that they have a right to operate their enterprises which are charged with the public interest and that whatever inconveniences are suffered by adjacent landowners are negligible when balanced against these interests.

Thus a court may, on the one hand, consider that noise and dust, though a source of irritation and annoyance, is not such as to be harmful to the health or comfort of ordinary people,<sup>15</sup> or, on the other hand feel that the noise would be so deafening as to interrupt the proper conduct of a school,<sup>16</sup> or summer camp,<sup>17</sup> or indeed, simply prevent the landowners' peaceful enjoyment of their land.<sup>18</sup>

Repeated flights at a low altitude which may be dangerous to the

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mean that one must never use his own property in such a way as to do any injury to his neighbor or his property, it could not be enforced in civilized society. People who live in organized communities must of necessity suffer some damage, inconvenience and annoyance from their neighbors. For these annoyances, inconveniences and damages, they are generally compensated by the advantages incident to living in a civilized state.

"[Speculative nature of anticipated damage]

"3. A brief summary of the contentions of the plaintiffs is that the defendants, if permitted to build and operate the airport, will inflict irreparable damage because of (1) noise, (2) dust, (3) attraction of crowds, who will trespass upon their premises, (4) annoyance in the peaceful enjoyment of their homes, (5) fright and fear of physical harm from low flying and the crashing of planes, (6) depreciation of property values.

"The long record of testimony and exhibits is replete with evidence offered in support of and against these claims. It is impossible, from this maze of evidence, to state with any degree of accuracy just what legal injury to the plaintiffs the evidence proves. To find that irreparable damage will follow from the operation of the port would be but guess and speculation. And to find that the use as an airport of approximately 450 acres of land beyond the city limits and away from the closely-built-up and congested part of the city is an unreasonable use of the land, would, we think, under the circumstances of this case, obstruct the development of aviation, as a legitimate and necessary industry, to an unreasonable extent.

"Undoubtedly the plaintiffs will experience some discomfort, but that is one of the incidents or results of residing in a heavily-populated, highly industrialized state. It is an incident of living in an age of progress, in which there are erected huge rubber factories, with their accompanying smells and noises; in which the streets and highways are used by great, noisy trucks for transportation; in which commercial airliners ply the skies continuously, for the speedy transport of persons and freight; and in which thousands of various industries throughout the cities and countryside contaminate and defile the former natural beauty, peacefulness and quiet of the vicinage."

<sup>14</sup> 6 Rev. Am. Jur., *Aviation*, par. 29, 140 ALR 1362; 90 L. Ed. 1222; and numerous cases cited therein.

<sup>15</sup> *Batcheller v. Com.* 176 Va. 109, 10 S.E. (2d) 529 (1940). *Smith v. New England Aircraft Co.* 270 Mass. 511, 170 N.E. 385 (1930).

<sup>16</sup> *Warren Twp. School Dist. v. Detroit* 308 Mich. 460, 14 N.W. (2d) 134 (1944).

<sup>17</sup> *Mohican & Reena v. Tobiasz* 1938 USAvR 1 (Mass. Sup. Ct. 1938).

<sup>18</sup> *Thrasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934); *Swetland v. Curtiss Airports Corp.* 55 F. 2d 201, (C.C.A. 6th 1932). It is interesting to note, however, that a later opinion involving the same airport as was the subject of the *Swetland* case indicated that public interest factors occasioned by public ownership of the property may well be grounds for a shift in balance in favor of the airport over the adjacent landowners. *Swetland v. Curtiss* 1950 USAvR 270 (D.C. Ohio 1950) aff'd. 188 F. (2d) 841 (C.C.A. 6th 1951).

health and life of the owner, or constitute an unreasonable annoyance to the landowner are actionable wrongs.<sup>19</sup>

Interestingly enough, however, it does not appear that the mere apprehension of injury from the falling of planes is sufficient to authorize an injunction against aerial navigation over the property of a neighboring landowner.<sup>20</sup>

On the other side of the picture, the courts have recognized that "property owners, to a reasonable degree, must yield their desired privacy to the general welfare which is contributed to by the operations of legitimate businesses,"<sup>21</sup> such as air transportation. Further than that, however, courts are increasingly recognizing the public interest involved in the operation of an airport, particularly the larger ones, and wish to hamper their operations as little as possible.<sup>22</sup>

In summary, therefore, it can be stated again that as between landowner versus airport the courts have considered their function as one of balancing equities drawn from the proven facts of each individual case. In some cases, particularly earlier ones, they went so far as to close down some airports completely by enjoining them as a nuisance.<sup>23</sup> In more recent decisions, however, indicating a more sympathetic view towards airport operations, they have sought to avoid going to such lengths and have often issued injunctions requiring take offs and landings to be made above a certain altitude over the objecting landowners' property.<sup>24</sup> Many recent cases refuse to issue any injunction at all on facts where earlier decisions would surely have done so.<sup>25</sup>

<sup>19</sup> *Hinman v. Pacific Air Transport* 84 F. 2d 755 (C.C.A. 9th 1936); *Delta Air Corp. v. Kersey* 193 Ga. 862, 20 S.E. 2d 245 (1942); *Vanderslice v. Shaun* 27 A. (2d) 87 (Del. Ct. Chan. 1942).

<sup>20</sup> *Thrasher v. Atlanta* 178 Ga. 514, 173 S.E. 817 (1934); *Batcheller v. Com.* 176 Va. 109, 10 S.E. 2d 529 (1940). It must be noted, however, that if flights are so low as to cause fear, grounds for action can probably be found in terms of other factors such as noise or low flying.

<sup>21</sup> *Anderson v. Souza* 1951 USAvR 334, 346 (D.C. of Appeals, 3rd District, Cal. 1951).

<sup>22</sup> *Kuntz v. Werner Flying Service Inc.* 257 Wis. 405, 43 N.W. (2d) 476 (1950); *Reynolds v. Wilson*, 2 Avi. 14,863 (Ct. Com. Pl. Lawrence County, Pa. 1949).

<sup>23</sup> *Swetland v. Curtiss Airports Corp.* 55 F. (2d) 201 (C.C.A. 6th 1931); *Gay v. Taylor* 19 Pa. Dist. & Co. Rep. 31, 1934 USAvR 146, Ct. of Com. Pl. Pa. Chester Co. 1932).

<sup>24</sup> *Anderson v. Souza* 1951 USAvR 334 (D.C. of Appeals, 3rd District, Cal. 1951); *Reynolds v. Wilson*, 2 Avi. 14,863 (Ct. Com. Pl. Pa. Lawrence Co. 1949); *Maitland v. Twin City Aviation Corp.* 254 Wis. 541, 37 N.W. (2d) 74 (1949) (injunction limited to 500 feet); *Hyde v. Somerset*, 1 N.J. Super. 346, 61 A. (2d) 645 (1948) (injunction requiring certain flight patterns). *Dlugos v. United Airlines*, 53 Pa. D.&C. 402, 1947 USAvR 392 (Ct. Com. Pl. Pa. Lehigh Co. 1947) (injunction limited to 100 feet); *Vanderslice v. Shaun*, 26 Del.Ch. 225, 27 A. (2d) 87 (1942) (injunction limited to 100 feet); *Burnham v. Beverly Airways*, 311 Mass. 628, 42 N.E. (2d) 575 (1942) (injunction limited to 500 feet); *Mohican & Reena, Inc. v. Tobiasz*, 1938 USAvR 1 (Mass. Hampden Co. Sup. Ct. 1938) (injunction limited to a height of 1000 feet within 500 feet of summer camp); *Thrasher v. City of Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934) (injunction against spread of dust in unreasonable quantities).

<sup>25</sup> *Crew v. Gallagher*, 58 D.&C. 226, 1948 USAvR 167 (Pa. Sup. Ct. E.D. 1948); *Kuntz v. Werner Flying Service, Inc.*, 257 Wis. 405, 43 N.W. (2d) 476 (1950). The Kuntz case stated that the damage was not sufficiently irreparable to warrant an injunction, but if specific damage did develop in the future, the Plaintiff could seek relief claiming damage in dollar amount. This seems to be a recent trend.



The reverse side of the coin involves suits by airports against landowners alleging activities which hamper airport operation. If the alleged obstruction is clearly a "spite" construction — e.g. tall poles of no value to the landowner except as they will prevent airplanes from flying low — the courts have not been sympathetic for it appears that the landowner is trying to force the airport to purchase his property.<sup>26</sup> They have either required the removal of such obstructions or limited their height. Involved in each decision, of course, is a basic analysis of the rights of the landowner as discussed above and the same "balance" of equities takes place.

When the obstruction is a legitimate one,<sup>27</sup> such as power lines<sup>28</sup> or a water tower<sup>29</sup> the courts have been more sympathetic to the landowner, particularly if the airport involved is a "private" airport not involving extensive interstate commerce.<sup>30</sup> If there is conflicting testimony as to whether the construction is really an obstruction,<sup>31</sup> or if the airport was negligent in not protesting the building until after it had been completed,<sup>32</sup> the landowner's side of the scale is additionally weighted. Finally, if it really appears that the construction is an obstruction, but a legitimate one, in the absence of prior enacted zoning laws the court will hold that to require the landowner to remove the obstruction would be a "taking" of property which can only be accomplished through the legitimate use of the power of eminent domain with due compensation to the landowner.<sup>33</sup>

#### STATE AND MUNICIPAL AUTHORITY OVER AIRPORTS

In the introduction to this article three questions were posed in connection with State and Municipal authority as they affect the conflicting claims of airports and landowners.

The first of these questions concerned the limits in the state or municipal power of eminent domain to secure land upon which to construct airports.

The question of whether a state, municipality, or public body created by a state has the authority to acquire, maintain, and operate public airports is a matter of the interpretation of specific state statutes

<sup>26</sup> *Liles v. Jarigan*, 1950 USAvR 90 (Chan. Ct. Roane Co. Tenn. 1949); *United Airports of Cal. Ltd. v. Hinman* 1940 USAvR 1 (D.C. Cal. 1939); *Commonwealth v. Bestecki* 1937 USAvR 1 (Ct. Com. Pl., Dauphin Co., Pa. (1937); *City of Iowa City v. Tucker* 1936 USAvR 10 (Dist. Ct. Johnson Co. Iowa, 1935).

<sup>27</sup> *Reaver v. Martin* 46 So. (2d) 896 (Fla. Sup. Ct. 1951) (drive-in theatre); *Air Terminal Properties v. City of New York* 16 N.Y. Supp. (2d) 629 (N.Y. Sup. Ct. 1939) (held trees did not interfere with airport's operation).

<sup>28</sup> *Guith v. Consumers Power Co.* 36 F. (2d) 21 (D.C. Mich. 1940); *Capitol Airways, Inc. v. Indianapolis Power & Light Co.* 215 Ind. 462, 18 N.E. (2d) 776 (1939). In *Postal Telegraph Cable Co. v. Pa. Pub. Util. Com.*, 235 C.C.H. para. 1700 (Pa. Sp. Ct. 1941) the court upheld an order of the Pa. Pub. Util. Com. in requiring the relocation of wires at the airport's expense.

<sup>29</sup> *Roosevelt Field v. Town of North Hempsted*, 88 F. Supp. 177 (D.C. N.Y. 1950).

<sup>30</sup> *Idem.*

<sup>31</sup> *Idem.*

<sup>32</sup> *Idem.*

<sup>33</sup> *Idem.*

or constitutions.<sup>84</sup> In early years taxpayers unsuccessfully sought to restrain the use of public funds for the acquisition of airports on the grounds that an airport was not a "public purpose" or "public utility" within the meaning of appropriate enabling legislation.<sup>85</sup>

Having passed this hurdle, the next obstacle was relatively simple. Eminent domain is a power which naturally flows from the police power possessed by the several states and its exercise is one which, as stated in state constitutions, may be exercised when property is needed for the "public use." It was not long before the courts had sustained the action of states and municipalities and of public corporations and airline companies if properly authorized under state legislation, in utilizing the power of eminent domain to acquire land to construct an airport as one for "public use."<sup>86</sup> The authority of the state to employ the power of eminent domain to acquire land for an airport to be constructed by the Federal Government has also been sustained.<sup>87</sup>

A second question which arises in relation to state regulation, is whether the fact that an airport was constructed, maintained, or operated by a state or other public body through proper enabling legislation, or is licensed by a state regulatory agency, lessens the rights which the landowner adjacent to an airport has in the enjoyment of his property. Does this fact affect the balance of conflicting claims discussed in the First Section of this article?

The mere fact that an airport has received a license from a state aeronautical commission or was built from public funds does not give it the authority to commit nuisances that it could not otherwise commit.<sup>88</sup>

On the other hand, although never controlling, this fact does add weight to the airport side of the scale in weighing conflicting claims of airport and landowners because it strengthens the "public interest" factor.<sup>89</sup> A privately owned airport, however, particularly where it is

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<sup>84</sup> Rhyne, note 4 above, Chapter 1 and cases cited therein.

<sup>85</sup> *Idem*, pages 20 to 31. 6 rev. Am. Jur., Aviation para. 31.

<sup>86</sup> Rhyne, note 4 above, Chapter 2, and cases cited therein; 135 ALR 756. In *State ex rel Helsel v. Commrs. of Cuyahoga Co.* 1948 USAvR 18 (Ct. of Appeals, Cuyahoga Co. Ohio 1948) it was held that a county had the authority to utilize the power of eminent domain to acquire land for an airport in spite of the fact that the area had been locally zoned as a residential area.

It is further to be noted that the utilization of the power of eminent domain does not always require that land adjacent to an airport be purchased in its entirety. Only an easement need be purchased. e.g. Okla. Section 13 of Airport Zoning Act of 1943, 1946 USAvR 221. In *Friendship Cemetery v. Baltimore*, 3 Avi. 17,289 (Cir. Ct., Anne Arundel County, Md. 1950) the court declared that the airport was not required to acquire the cemetery because the enjoyment of the property was not decreased by an aircraft approach thereover. It held that the cemetery could maintain an action in trespass to receive compensation for any specific damage done to the cemetery by workmen working on the nearby airport. Today about half of the states authorize the use of eminent domain as a means to compensate for damage to property as well as for "taking."

<sup>87</sup> Rhyne, note 4 above, pages 36 to 39.

<sup>88</sup> *Hyde v. Somerset*, 1 N.J. Super. 346, 61 A (2d) 645 (1948); *Delta Air Corp. v. Kersey*, 193 Ga. 862, 20 S.E. (2d) 245 (1942); *Gay v. Taylor*, 19 Pa. D & C 31 1934 USAvR 146 (Ct. of Com. Pl., Pa. Chester Co. 1932).

<sup>89</sup> *Swetland v. Curtiss*, 1950 USAvR 270 (D.C. Ohio 1950) aff'd. 188 F. (2d) 841, 151 USAvR 227 (C.C.A. 6th 1951).

a small one, is treated just like any other ordinary business enterprise even though it may be available to the general public. Its value to the "general welfare" is the same as any business enterprise would be.<sup>40</sup>

An airport which is owned by a state or other public body, however, is definitely in the "public interest." Indeed, as pointed out above, its original acquisition of the land, both through the use of public funds and possibly eminent domain, had to have a "public" character.<sup>41</sup> But it is clear that the fact that the airport itself was deemed in the public interest does not mean that the individuals or corporations acting primarily for their own benefit, although the public benefit as well, using the airport, may deprive the adjacent landowners of their enjoyment of property.<sup>42</sup> It would further appear that the political subdivision of the state which operates the airport is not immune from liability by way or damage or injunction, for a legislature cannot confer immunity for action for a private nuisance of such a character as to amount in effect to the taking of private property for public use.<sup>43</sup>

The third question, and perhaps the most important one relating to states, concerns that of zoning. An airport costing many millions of dollars can soon be worthless if the surrounding area is allowed to be built up so as to obstruct approaches thereto.

The power to zone as a general matter, although a relatively recent development, is an undisputed exercise of a state's police power.<sup>44</sup> As far as a municipality or other public body is concerned, however, it must receive specific authority from state legislation in order to do so. For example, the City of Newark sought to zone the area around the Newark airport some time ago but was prevented by court action on the grounds that the state had not specifically authorized the City of Newark to do so.<sup>45</sup> Almost all states now have a statute (most of which are similar to the model statute drafted by the National Institute of Municipal Law Officers of the C.A.A.) authorizing the adoption of zoning ordinances.<sup>46</sup>

The power to zone, however, is a limited one. It must not be unreasonable or open to charges of discrimination or uncertainty.<sup>47</sup> Of

<sup>40</sup> *Anderson v. Souza*, 1951 USAvR 335 (Dist. Ct. of Appeals, 3rd Dist., Cal. 1951); *Roosevelt Field v. Town of North Hempsted*, 88 F. Supp. 177 (D.C. N.Y. 1950).

<sup>41</sup> See notes 35 and 36 above.

<sup>42</sup> e.g. *Hyde v. Somerset*, 1 N.J. Super. 346, 61 A (2d) 645 (1948).

<sup>43</sup> *State ex rel Helsel v. Commrs. of Cuyahoga Co.* 1948 USAvR 18 (Ct. of Appeals, Cuyahoga Co. Ohio 1948); *Thrasher v. Atlanta*, 178 Ga. 514, 173 S.E. 817 (1934). But see *Stocker v. Nashville*, 174 Tenn. 483, 126 S.W. (2d) 339 (1939).

<sup>44</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926); 58 Am. Jur. Zoning, para. 18.

<sup>45</sup> *Yara Engineering Corp. v. City of Newark*, 132 N.J. L. 370, 40 A (2d) 559 (Sup. Ct., N.J. 1945); *Rice v. City of Newark*, 132 N.J. L. 387, 40 A (2d) 561 (1945).

<sup>46</sup> Rhyne, note 4 above, pages 171 to 173; Rhyne, *Airport Legislation and Decisions*, 14 J. of Air Law and Com. 289, 296 (1947).

<sup>47</sup> 58 Am. Jur. Zoning, paras. 20 to 24.

primary importance, however, is the fact that it cannot go beyond the line of regulation and become an actual taking of property without just compensation. Zoning, of course, as with any other exercise of police power, takes away some of the rights incident to the property in the public interest.<sup>48</sup> If zoning attempts to deprive the landowner of a substantial interest in his property under the pretense of regulation, however, and results in a substantial diminution of property values, then it becomes a "taking" without due process of law, and if the state or public body desires the property it must utilize its power of eminent domain.<sup>49</sup> The facts of the particular case determine when this line is reached.<sup>50</sup> One case suggests that the "line" may be farther in a matter such as public health than when the question is zoning an area around a private airport.<sup>51</sup> Another case has voided a zoning ordinance limiting the erection of any building within 100 feet of an airport.<sup>52</sup> It also would appear evident that any state action setting a "navigable zone" for aircraft approaching an airfield could equally be considered a "taking" which could only be accomplished through eminent domain if, in fact, it resulted in a substantial diminution of value of the land.<sup>53</sup>

Accordingly, zoning is best when it has no retroactive effect, and only limits development which *might* occur in the future as opposed to development which already exists or is on its way. The C.A.A. in its administration of the Federal Airport Act has quite rightly and wisely required adequate zoning provisions prior to its approval of any airport project. However, zoning insofar as it applies to already populated areas immediately raises the problem of whether it is a "taking."

<sup>48</sup> Rhyne, note 4 above, pages 177 to 179.

<sup>49</sup> *State ex rel Helsel v. Commrs. of Cuyahoga Co.*, 1948 USAvR 18 (Ct. of Appeals, Cuyahoga Co. Ohio, 1948); *Dutton v. Mendocino County*, 1949 USAvR 1 (Sup. Ct., Mendocino Co., Cal. 1948); *Mutual Chemical Co. of America v. Baltimore*, 1939 USAvR 11 (Balto. City, Cir. Ct. No. 2, Md. 1939).

<sup>50</sup> In discussing the line where regulation under the police power becomes a "taking," Mr. Justice Holmes in *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S. Ct. 158, 67 L. Ed. 322 (1922), said:

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most, if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the Legislature, but it always is open to interested parties to contend that the Legislature has gone beyond its constitutional power."

<sup>51</sup> *Dutton v. Mendocino County*, 1949 USAvR 1 (Sup. Ct., Mendocino Co., Cal. 1948).

<sup>52</sup> *Mutual Chemical Co. of America v. Baltimore*, 1939 USAvR 11 (Balto. City, Cir. Ct. No. 2, Md. 1939).

<sup>53</sup> *Gay v. Taylor*, 19 Pa. D & C 31, 1934 USAvR 146 (Ct. of Com. Pl., Pa., Chester Co. 1932). See: *United States v. Causby*, 328 U.S. 256, 166 S. Ct. 1062, 90 L. Ed. 1206 (1946).

## THE FEDERAL GOVERNMENT'S POWER OVER AIRPORTS

The question of the scope of the authority of the Federal Government over airports is one of particular importance and yet, unfortunately, the one which has been least considered by the courts.

The three powers of the Federal Government which are of primary interest are zoning, regulation of airport approaches, and regulation of airports themselves — particularly their closing. Each of these will be considered in detail below, and will, of necessity, involve a discussion of the two basic issues of this article: (1) the conflict of State and Federal jurisdiction; and (2) the conflict between the regulation of air navigation for the public good and the rights of landowners adjacent to airports and/or the airport owners themselves.

*The Power to Zone*

*History.* There is no existing legislation which would authorize the Federal Government to zone areas around airports.<sup>54</sup> In January of 1943 a bill was introduced into Congress (H.R. 1012) which provided the Civil Aeronautics Board with authority to set up a nationwide program of zoning and with power in case the States failed to act in accordance therewith. The bill was never reported out because of the controversial issues contained therein.<sup>55</sup>

Accordingly, whatever airport zoning action has been taken, has been accomplished by the States or their appropriately authorized subdivisions. The C.A.A. has indirectly assisted in this development by requiring prior to approval of any project under the Federal Airport Act that proper zoning measures be taken, and by working out in conjunction with the National Institute of Municipal Law Offices a model zoning act which has now been enacted by more than thirty-five States and the Territories of Alaska and Hawaii, and by governing bodies of a number of State subdivisions. The lack of uniformity in zoning by local authorities, as well as the "gaps" where no zoning authority exists at all, tends to show the need for the adoption of a Federal zoning program with authority to enforce such a program in areas where State action is not forthcoming.

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<sup>54</sup> Thus the C.A.A. at this time has no power to limit the height of man-made or natural structures around an airport, although its regulations do require that notice of any possible obstructions to air navigation be given. See discussion in *Roosevelt Field v. Town of North Hempsted*, 88 F. Supp. 177 (D.C. N.Y. 1950).

<sup>55</sup> An excellent memorandum prepared by Mr. Howard Westwood appears at page 249 of the Report of the Hearings held on this bill before the Committee on Interstate and Foreign Commerce (H.R. 1012, 78th Cong., 1st Sess.). Mr. Westwood concludes that Congress had the Constitutional authority to provide for the limitation of the height of structures and natural objects near an airport as set forth in the proposed bill. Means by which landowners would be compensated if required to alter structures on their lands were included in the bill but it was silent as to the possible compensation of landowners, the value of whose land was reduced by the zoning regulations. Mr. Westwood thought that this silence might result in a Constitutional defect in the proposed bill—a conclusion with which we agree.

*Legal Principles.* There are two basic issues involved in a discussion of the Federal power to zone areas around airports: What is the scope of the power to zone? When does its exercise require compensation paid to private landowners?

(a) *The Scope of the Power to Zone.* The question of the extent of the power of the Federal Government to zone has never been judicially determined.<sup>56</sup>

The power to zone, however, is not a power *per se* but, like eminent domain, is a collateral power which may be used to effectuate a basic authority. Accordingly, just as the states have the power to zone as a collateral power in the exercise of their police power to protect the health and welfare of their citizens, as pointed out above, we believe that the Federal Government has the power to zone in connection with its authority to regulate interstate commerce,<sup>57</sup> and its postal and war powers. The question is whether this power extends not only to vertical zoning to prevent air approach obstructions, but also to zoning land uses in an azimuth area at either end of an airport runway.

We believe that unquestionably the Federal Government has the authority, through appropriate legislation, to control the height of structures or natural objects in an area surrounding an airport to protect interstate air navigation. It has been held that the Federal Government could utilize the power of eminent domain to acquire land for an airport since the construction of airports is a legitimate exercise of the Constitutional power to regulate interstate commerce.<sup>58</sup> It would follow that it has the power to zone to protect approaches to the airport, or otherwise, its power to build airports is rendered ineffectual. Similarly if the Federal Government has the power to con-

<sup>56</sup> The Federal Government has never had occasion to engage in airport zoning. Usually in the past when it wanted the use of airspace as an approach to an airport, it either bought the underlying land outright, "took" it and then paid for it upon a suit alleging a deprivation of property without just compensation, *United States v. Causby*, 328 U.S. 256 (1946), or, more recently, applied the use of eminent domain. *Jasper v. Sawyer*, 100 F. Supp. 421 (D.C. D.C. 1951); *U.S.A. v. 1.01 Acres of Land in the District of Columbia*, 1948 USAvR 22 (D.C. D.C. 1948). As has been noted above, however, it indirectly assisted the states in airport zoning activities.

Indeed, the Federal Government has not had occasion to "zone" [as that term is commonly understood by the layman] in any field to any extent in the past. Congress has authorized the National Capital Park and Planning Commission to do so in relation to the District of Columbia; 40 U.S.C. 71, and it has authorized the Secretary of Agriculture to zone, in "cooperation with the States concerned," areas adjacent to the Mexican border to prohibit the growing of cotton in order to stop the spread of the pink bollworm from Mexico. 7 U.S.C. 145. As a matter of fact, however, areas in navigable waters have been "zoned" as quarantine areas etc. as have areas in the airspace over atomic plants. (See note 64 below). There is no substantial difference between zoning of this type and the designation of primary activities in various municipal areas.

<sup>57</sup> Although reference is only made to the power of Congress to regulate "interstate" commerce hereafter, the power to regulate "foreign" and "overseas" commerce is equally applicable.

<sup>58</sup> A decision last year in the District Court of the District of Columbia, *Jasper v. Sawyer*, 100 F. Supp. 421 (D.C. D.C. 1951), had this to say in regard to the proposed Burke Airport in Virginia:

"It is settled by decisions of the Supreme Court, beyond peradventure of doubt, that the U.S. is clothed with the power of eminent domain. Even though the power was not expressly conferred by the Constitution, the power

trol interstate air navigation through the promulgation of rules of flight, etc.,<sup>59</sup> its power to zone around existing airports not owned by the Federal Government would seem equally to follow because rules of flights will not foster the development of interstate air navigation if obstructions can prevent the operation of such rules. Recent decisions of the Supreme Court which have recognized the broad sweep of the power of Congress to regulate interstate commerce would support this conclusion.<sup>60</sup> Vertical zoning once authorized by Congress and effectuated by a federal administrative agency, would supersede and preclude state zoning of the same area.<sup>61</sup>

A much more difficult problem, however, concerns the power to zone an area surrounding an airport in order to prevent it from developing into a residential area whose citizens may seek to enjoin the operation of the airport at some future time as a "nuisance" — e.g. the noise and glaring lights of the landing aircraft destroys the value of their property as a residence. This power is not as clearly connected with the regulation of interstate commerce as the restriction of the heights of buildings,<sup>62</sup> except in an anticipatory manner. However, as noted above, the Supreme Court has gone to such extremes in vali-

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is implied and is incidental to carrying out other powers. *Kohl v. United States*, 91 U.S. 367, 23 L. Ed. 449. The right of eminent domain which exists in the federal government may be exercised by it within the states so far as it is necessary to the enjoyment of the powers conferred upon it by the Constitution. Under its power to regulate commerce between the states as well as foreign commerce, it is fundamental that Congress may construct, maintain, and operate instrumentalities of such commerce. . . . Since the early days of the Republic, acting under this power as well as the power to maintain post offices and post roads, Congress constructed such instrumentalities of commerce as roads, highways, bridges, lighthouses and the like.

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"It is clear that in the light of modern developments, an airport is an instrumentality of both foreign and interstate commerce."

<sup>59</sup> See Section 601(a) (7) of the Civil Aeronautics Act of 1938, as amended cited in the text below. See, also, the comprehensive regulatory power granted to the Board and the Administrator in the Air Commerce Act of 1926 and the Civil Aeronautics Act itself. 49 U.S.C. 171 et. seq.; 49 U.S.C. 401 et. seq.

<sup>60</sup> Mr. Chief Justice Stone made the broad statement in *United States v. Darby Lumber Co.*, 312 U.S. 100, 115, 61 S. Ct. 451, 85 L. Ed. 609 (1941) that "Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." See, also, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942).

<sup>61</sup> The power to zone is a power jointly possessed by the federal and state governments—the one primarily pursuant to its power to regulate interstate commerce and the other pursuant to its police power. The state governments are free to utilize this power until the federal government acts. If legislation which the Congress validly passes on this subject sufficiently "occupies the field," all state action is superseded or thereafter prevented.

<sup>62</sup> Protection of the health and safety of the residents near to an airport is an area within the orbit of the states' police powers. Unless zoning by the Federal Government directed to the protection of such residents can be geared to a specific constitutional authority, such as the regulation of interstate commerce, it would be held as a usurpation of the States' police powers. It is doubtful whether the Constitutional authority to tax and spend for the "general welfare" would in and of itself be sufficient to support such legislation although there is some language in recent decisions of the Supreme Court which would support this view.

dating Congressional legislation pursuant to the power of Congress to regulate commerce, that we believe there is a very good chance zoning power of this nature would be upheld. Certainly, if any analogy to the navigable waters cases can be followed which have held that all riparian owners hold their property subject to a "servitude" in the United States for regulatory purposes and without compensation for damage thereto, such zoning power would be upheld.<sup>63</sup>

Constitutional authority for a Federal Zoning Act can be sufficiently established in the power to regulate interstate commerce with the possible *caveat* of azimuth zoning referred to in the paragraph immediately above. Additional authorization, however, can also be found in the postal and war powers granted to Congress by the Constitution which will be only briefly discussed.

Congress has the power to establish post roads and to make all laws necessary and proper to carry this power into execution. Pursuant thereto Congress has declared that "all air routes which are now or hereafter may be in operation" are "post roads." (39 U.S.C. 481) It would seem to be inherent in the power of Congress to establish "post roads" to protect them through zoning legislation.

Congress also has the power to provide for the national defense. A realistic analysis of this power, of course, does not limit it to periods when an actual declaration of war is in effect. Zoning, of course, may be one way in which the national defense may be provided for. Thus, the Supreme Court in *McKinley v. U.S.*, 249 U.S., 397 (1918) upheld without question the section in the draft law of 1917 authorizing the Secretary of War to zone areas around military encampments and by regulation to prohibit prostitution therein.<sup>64</sup>

(b) *Zoning and compensation due private landowners.* The question involved in any exercise of the power to zone either by the States now, or by the Federal Government at some future time, is when does the diminution of property values become such that it is a taking for which the property owner must be compensated under the Fifth Amendment?

The analogous problem involving state regulations which have been challenged as a deprivation of property without due process pursuant to the 14th Amendment has been discussed above. Mr. Justice Holmes' effort in *Penn. Coal Co. v. Mahon*, 200 U.S. 393 (1922) to establish a criteria in determining when property values may be diminished by regulation in the public interest with or without compensation was there noted.<sup>65</sup>

In the field of Federal regulation the Supreme Court has often declared that the utilization of the power to regulate interstate com-

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<sup>63</sup> See Memorandum of Mr. Westwood at note 55, above, for a full discussion of these cases.

<sup>64</sup> Although perhaps not considered "zoning" in its commonly understood sense, Congress has authorized the creation of air space reservations over areas, such as atomic plants, where deemed necessary in the national defense. P.L. 664, 81st Cong., 2nd Session (1950), 1950 USAvR 448.

<sup>65</sup> See footnote 50, above.



merce<sup>66</sup> or to provide for the national defense<sup>67</sup> has a limitation in that it cannot extend so far as to comprise a "taking."

Unfortunately, the question when an application of the Federal Zoning Statute would amount to a regulation in the public interest which results in non-compensable diminution in property values and when such a regulation amounts to a compensable "taking" depends so much on the facts of the case, that it is impossible to spell out the line clearly. The "balance" will always be one between public and private interest as set forth in the many zoning cases brought up under the 14th Amendment.<sup>68</sup> The monetary value of the private investment is important — e.g., how much is the value of the property diminished — but this may be partially outweighed, but never completely so, by the public interest involved.

The area in which zoning is much more apt to be a "taking" is, of course, where there are established structures and businesses which will be destroyed.<sup>69</sup> It is less apt to be a "taking" when merely the future use of property will be restricted.<sup>70</sup> Or stated in a different way, zoning regulations will undoubtedly affect landowners adjacent to airports in such a manner that compensation will probably be necessary. Landowners at a farther distance from an airport under an aircraft approach pattern will be less directly affected and will probably not have to be compensated, or at least not to the same extent.

This problem is so nebulous, however, that if any Federal Zoning Act should include a provision whereby a landowner who alleges that he has been aggrieved may have an opportunity to have his grievance heard and adjudged. Otherwise the statute may be struck down as violative of the Fifth Amendment.<sup>71</sup>

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<sup>66</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336, 13 S. Ct. 622, 37 L. Ed. 463 (1892).

<sup>67</sup> This was, in essence, the problem involved in the *Causby* case, *supra*. See footnote 12.

<sup>68</sup> Mr. Westwood has suggested in his Memorandum at pages 266 and 267, referred to in note 55 above, that the courts, when called upon to consider the question of Federal Zoning, might seek their guide in the field of Federal regulation over navigable waters rather than in zoning cases. In navigable waters cases the doctrine has been developed "that one who owns riparian land holds it subject to 'the servitude in respect of navigation' 'created in favor of the Federal Government by the Constitution.' This doctrine originated in the Court's desire to save the Federal Government harmless from liability to private persons for damages caused by its development of water transportation." If this analogy were applied, the Courts might go so far as to restrain the use of lands near airports, to inflict heavy damages on such land, and even to destroy them altogether without compensation. Mr. Westwood hesitates to think that this analogy would be applied to air transportation, however. Furthermore, the implications of the *Causby* case, as applied in the Court of Claims on remand, would not seem to be in sympathy therein. It is concluded, therefore, that it is doubtful whether any court would ever apply the analogy of navigable waters cases to develop a doctrine authorizing the Federal Government through zoning authority to destroy property rights around airports.

<sup>69</sup> But, see, *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S. Ct. 143 (1915), where the Court upheld an ordinance prohibiting the operation of brickyards in residential districts which reduced the value of a brickyard from \$800,000 to \$60,000.

<sup>70</sup> See footnote 12, above.

<sup>71</sup> See footnote 55, above.

*The Power to Regulate Airport Approaches*

It is safe to say that it is indisputable that Congress has the authority, pursuant to its power to regulate interstate commerce, to provide for the regulation of airport approaches utilized by aircraft in interstate air navigation.<sup>72</sup>

It still has not been definitely decided to what extent Congress can determine airport approach patterns for aircraft in *intrastate* air navigation. A recent decision by a California court declared that "the police power in intrastate air traffic is vested in the State and not in the Federal Government except for the benefit of Army and Navy airports and interstate air traffic under the interstate clause of the Constitution."<sup>73</sup> On the other hand, lower Federal courts have been unanimous in declaring that if an intrastate flight "affects" interstate commerce, it is subject to the regulations of the C.A.A.<sup>74</sup>

<sup>72</sup> The cases cited in note 74, as well as the implications of the *Causby* case, compel this conclusion. See also the statement of Mr. Justice Jackson in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 303, 64 S. Ct. 950, 88 L. Ed. 1283 (1944), where he said:

"Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of Federal control. . . . *Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water.* Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by Federal permission, subject to Federal inspection, in the hands of federally certified personnel and under an intricate system of Federal commands. . . . *Its (aircraft) privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any State government.*" (Italics supplied.)

<sup>73</sup> This view has been taken by the California courts: *Parker v. James Granger Inc.*, 4 Cal. (2d) 668, 52 P. (2d) 266 (1935), held that the State of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely intrastate flights. In following this decision, *Strather v. Pacific Gas & Electric Co.*, 211 P. (2d) 624 (Dist. Ct. of Appeals, 3rd Dist., 1949), a lower California court denied Plaintiff's claim that the U.S. Government has exclusive sovereignty of the air throughout the U.S. and may (through the C.A.A.) exercise control of air traffic whether it consists of interstate or intrastate traffic. It conceded, under the *Causby* case, Federal sovereignty in "higher airspace" but not lower airspace over a private owner's property, the use of which is intrastate and which is necessary and beneficial to reasonable enjoyment of his land. It concluded, as cited above, that "police power in intrastate air traffic is vested in the State and not in Federal Government except for the benefit of Army and Navy airports and interstate air traffic under the interstate clause of the Constitution." See also, *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F. (2d) 761 (D.C. Ohio 1929).

The following courts, although not dealing specifically with C.A.A. regulations, have declared State sovereignty over intrastate air traffic: *Erickson v. King*, 218 Minn. 98, 15 N.W. (2d) 201 (Minn. 1944); *Aviation Credit Corp. v. Gardner*, 174 Misc. 798, 22 N.Y. (2d) 37 (Sup. Ct., Erie County, N.Y.) (1940); *Smith v. New England Aircraft Co., Inc.*, 168 Wis. 436, 170 N.W. 285 (1930).

<sup>74</sup> *Rosenhan v. U.S.*, 131 F. (2d) 932 (C.C.A. 10th 1942) (Aircraft in Intrastate commerce may still "affect" interstate commerce to such an extent as to be within the scope of aircraft registration requirements of Civil Aeronautics Act.) *U.S. v. Drumm*, 55 F. Supp. 151 (D.C. Nov. 1944) (Regulation requiring pilot certification and aircraft airworthiness certificate for local non-commercial flights sustained.) Court decisions have also sustained the C.A.A.'s position that pursuant to Civil Aeronautics Act all aircraft, even though used only in

When this issue comes before the Supreme Court for decision, it is predicted that the very minimum it will hold is that the Federal Government has the power to prescribe flight approaches to airports which are substantially utilized by aircraft in interstate commerce. This will leave the only field for State legislation to the determination of flight approaches to very small private airports.

What has Congress done in effectuating its power over interstate commerce in regard to the regulation of airport approaches?

Section 601 (a) (7) of the Civil Aeronautics Act of 1938 is most inclusive. It authorizes the Board to promulgate "air traffic rules governing the flight of, and for the navigation, protection . . . of aircraft, including rules as to safe altitudes of flight and rules for the prevention of collisions between aircraft, and between aircraft and land or water vehicles."

Pursuant to this Congressional mandate, it is clear that the Board or the C.A.A. could determine traffic patterns into and out of any airport in the country for any aircraft engaged in interstate commerce. As noted above, we also believe that this authority would extend to the determination of airport approaches for all aircraft utilizing an airport which is substantially used by traffic consisting of interstate, foreign, or overseas air transportation.

The power of the Board and the Administrator to regulate airport approaches under the Civil Aeronautics Act has not been exhausted. Under existing law it can prescribe air traffic patterns which will supersede all other air traffic patterns.<sup>75</sup>

The only limit to the exercise of this authority is, as in the case of zoning, the point where regulation may so affect the value of the property owners beneath the airport approach pattern that it constitutes a compensable "taking." In such instances, eminent domain must be utilized either to acquire title to the land below or, at least, to acquire an easement through the airspace,<sup>76</sup> or else a landowner can secure an injunction closing or restricting the airport's operation.<sup>77</sup>

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intrastate commerce, are subject to title recodation: *In Re Veterans' Air Express Co.*, 76 F. Supp. 684 (D.C. N.J. 1948); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E. (2d) 610 (Ga. Ct. App. 1949).

It is to be noted that the cases cited herein and in note 73 above have been limited to the *safety* aspects of air navigation. In regard to *economic* regulation, the Civil Aeronautics Board appears to have voluntarily recognized that the Civil Aeronautics Act does not go as far as it does in relation to safety matters.

<sup>75</sup> Compare Section 601(a)(7) of the Civil Aeronautics Act and Parts 60.18(c) and (d) of the Civil Air Regulations.

<sup>76</sup> As is noted on page 30 below, the Administrator was granted the authority in 1948 to exercise the power of eminent domain to acquire title to land needed in the establishment of civil airways. Its authority to acquire easements in the airspace is limited, however, to easements required in the case of air-navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator. 49 U.S.C. 452. Accordingly, in order to acquire easements in the airspace over non-federally owned and operated airports, additional legislation would appear to be needed.

<sup>77</sup> *Swelland v. Curtiss Airports Corp.*, 55 F. (2d) 201 (C.C.A. 6th, 1932).

This analysis makes it unnecessary to consider the vexing question of the ownership of the "airspace" and the right of transit there-through.<sup>78</sup> The Civil Aeronautics Act provides any citizen of the United States a "public right of transit in air commerce through the navigable airspace of the United States" and further defines "navigable airspace" as airspace above the minimum safe altitudes of flight prescribed under the Act.<sup>79</sup>

In Part 60.17 of the Civil Air Regulations, the Board has set forth certain "minimum safe altitudes." It is there noted that "except when necessary for take-off or landing" no person shall operate an aircraft below the specified altitudes. Thus certain altitudes are required over "congested" areas while others are required over "other than congested areas." It is doubtful, however, whether the Board in determining these altitudes was considering the effect which they would have upon the determination of "navigable air space" as defined by the Act. Rather, it would seem, the Board was simply concerned with safety as evidenced by the fact that the "minimum safe altitude" in case of a power failure is one which will allow an emergency landing without undue hazard to persons or property on the surface. This situation casts considerable confusion into the determination of what is "navigable air space."

As noted above, however, it is not necessary to resolve that question. The Board presently has authority from Congress to regulate and determine airport approaches, some of which it has delegated to the C.A.A. Accordingly, all that needs be done is as follows: (a) the best airport approach pattern for a particular airport can be determined; (b) if it appears that that airport approach pattern depreciates property values of underlying landowners, the power of eminent domain can then be exercised to acquire title to the land or an easement through the airspace. The Administrator presently has the authority to acquire land needed for such purposes, and in the case of air-navigation facilities (including airports) owned by the United States and operated by the Administrator, to acquire easements through or other interests in airspace at a price which takes into consideration reasonable probable future use of the underlying land. 49 U.S.C. 452 (c). This statutory authority should be extended to authorize the condemnation of easements through the airspace surrounding airports not owned by the United States and operated by the Administrator.

### *The Power to Regulate the Use of Airports*

There is no existing legislation which would authorize the C.A.B. to exercise the kind of direct regulatory power over an airport which would, for example, confer power to determine when it should be

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<sup>78</sup> See: Cooper, John C., *State Sovereignty v. Federal Sovereignty of Navigable Airspace*, 15 J. of Air L. & Com. 27 (1948); Dinu, Madeline C., *State Sovereignty in the Navigable Airspace*, 17 J. of Air Law & Com. 43 (1950).

<sup>79</sup> 49 U.S.C. 180, 403.

opened or closed. It appears that the Federal Government could, through appropriate legislation establishing standards for regulatory action appropriately related to Federal powers over interstate commerce, the postal service, and national defense occupy for itself the power to regulate airports under those standards, including the power to open and close them. Under such legislation, it is clear that the Federal Government could act appropriately where buildings and natural obstructions surrounding an airport endanger the airport's approach patterns to such an extent as to endanger interstate air navigation utilizing the airport. Whether such legislation could exclude the exercise by States and municipalities of their police power with respect to airports can only be finally determined by judicial decision. However, any such Federal legislation should make it clear that the intent of the legislation is for the Federal Government to occupy the field exclusively so far as legally possible. The scope of the constitutional authority which would embrace such power has been explored above.

Airports are vital and integral parts of any interstate air transportation pattern which the Congress, through its power to regulate interstate commerce, can control.<sup>80</sup> Accordingly, constitutional principles appear to support congressional authority to authorize the C.A.B. or the C.A.A. to grant "certificates" to airport operators whose standards meet those prescribed as being consistent with the protection of interstate air transportation. Similarly, the power to suspend, to revoke, and to regulate abandonment of those "certificates" could be placed within the purview of the C.A.B.'s or CAA's authority on the grounds that it is necessary to protect the interstate air transportation using such airports.

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*Authors' Note:* The above article was prepared in April of 1952. Since that time an interesting decision has been published which confirms positions taken in the article and further develops the legal analysis relating to certain of the problems dealt with therein. In *All American Airways, Inc. et al. v Village of Cedarhurst*, 3 Avi, Rep. 17,940 (D.C. E.D. N.Y. 1952) ten airlines utilizing Idlewild Airport, the President of the Air Line Pilots Association, the Port of New York Authority, and ten individual pilots brought an action against the Village of Cedarhurst to secure a preliminary injunction against the enforcement of an ordinance prohibiting, *inter alia*, the flight of aircraft over the village at an altitude of less than 1000 feet. The defendants contended that the ownership of the air space is vested in the owner of the surface soil beneath it citing the *Causby* Case (discussed at length in the article above) and the implication to be found in Section 302 (c) (2) of the Civil Aeronautics Act, 49 U.S.C. 452 (c) (2), authorizing the administrator "to acquire by purchase, condemnation, lease, or otherwise, . . . easements through or other interests in air space immediately adjacent thereto . . ." The Court stated that the *Causby* Case was diametrically opposed to the Defendant's contention and that Congress did not intend that the Administrator "should be required to condemn or otherwise acquire the air space adjacent to every plot of land over which planes under its supervision and control would be obliged to fly in landing at or leaving an airport." (*Underlining supplied*) The Court further stated that if that were the intent of Congress, then the "remedy of the affected property owner is by an action for damage in the Court of Claims . . ."

The Court then declared the ordinance unconstitutional and invalid. It

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<sup>80</sup> See: *Jasper v. Sawyer*, 100 F. Supp. 421 (D.C. D.C. 1951).

pointed out that Congress passed the Civil Aeronautics Act pursuant to the commerce power of the Constitution, that the Act provided a "public right of freedom of transit in air commerce through the navigable air space," which is the "air space above the minimum altitudes of flight prescribed by regulations issued under' said Act," and that the Board, acting under this authority, has issued rules and regulations governing flight operations into Idlewild including instances where the minimum altitude over Cedarhurst would be less than 1000 feet. Under these circumstances, the Court concluded, the ordinance of Cedarhurst was in conflict with the Civil Aeronautics Act and the rules and regulations issued thereunder, assumed control over air space preempted by the United States of America under the Act, and violated the Constitution of the United States. The Court further felt that in view of the large investment in Idlewild and the employment created thereby, as well as the potential loss of revenue and the hazards to air navigation if the ordinance was enforced, the plaintiffs would suffer irreparable injury unless a preliminary injunction were granted, and accordingly, issued the injunction. We understand that an appeal is now pending in the Second Circuit Court of Appeals.

Another interesting opinion is found in the decision of the California Supreme Court in *Anderson v. Souza* 1952 U.S. Av. R. 216. (The decisions of the lower court in this case are cited in footnotes 21 and 24 above.) In line with the recent trend, the Court declared that a general injunction against an airport's operations should not be granted in case of a nuisance, but only an injunction against specific types of operations which created the alleged nuisance.